Supreme Court, U.S.
FILED
JAN 30 1987
[illegible]NIOL, JR.
CLERK

No. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER H. RANKIN, *et al.*,
Petitioners,

v.

ARDITH S. MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

BRUCE V. GRIFFITHS *
GREATER HOUSTON
AMERICAN CIVIL
LIBERTIES UNION
1236 West Gray
Houston, Texas 77019
(713) 524-6021

ALVIN J. BRONSTEIN
DAVID B. GOLDSTEIN
AMERICAN CIVIL
LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

LLOYD N. CUTLER
WILLIAM R. RICHARDSON, JR.
CARL R. JOHNSTON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ANNIE S. GARCY
GORDON QUAN &
ASSOCIATES, P.C.
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

* Counsel of Record

Counsel for Respondent

January 30, 1987

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Can a nonpolicymaking, nonconfidential county employee be constitutionally discharged for a private expression of her views on the policies of the President, where those views were wholly unrelated to office matters and were found to have had no disruptive effect upon the office, merely because her deplorable choice of words caused her superior to "los[e] confidence" in her?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Procedural History	10
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. MS. McPHERSON'S PRIVATE CONVERSATION CRITICIZING GOVERNMENT POLICIES WAS AN EXPRESSION OF POLITICAL BELIEFS THAT WAS CLEARLY DIRECTED TO MATTERS OF PUBLIC CONCERN AND IS ENTITLED TO FIRST AMENDMENT PROTECTION	19
A. This Court Must Exercise Its Independent Judgment to Ascertain the Meaning and Significance of Ms. McPherson's Conversation	20
B. An Independent Examination of the Content, Form, and Context of Ms. McPherson's Statement Compels the Conclusion That It Was a Protected Form of Political Hyperbole	22
C. Whatever She Meant by Her Remark, Ms. McPherson's Conversation Was Protected Political Speech on a Matter of Public Concern	25

TABLE OF CONTENTS—Continued

Page

II. MS. McPHERSON'S INTEREST IN PRIVATELY EXPRESSING HER OBJECTIONS TO THE POLICIES OF THE FEDERAL GOVERNMENT CLEARLY OUTWEIGHS CONSTABLE RANKIN'S INTEREST IN HAVING "CONFIDENCE" IN HER 29

CONCLUSION 42

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Abrams v. United States, 250 U.S. 616 (1919)	29
American Communications Association v. Douds, 339 U.S. 382 (1950)	40, 41
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	30
Arnett v. Kennedy, 416 U.S. 134 (1974)	35
Bachellar v. Maryland, 397 U.S. 564 (1970)	28
Baggett v. Bullitt, 377 U.S. 360 (1964)	34
Baumgartner v. United States, 322 U.S. 665 (1944)	28
Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 2278 (1986)	33
Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986)	25
Bond v. Floyd, 385 U.S. 116 (1966)	24, 34, 37
Brandenburg v. Ohio, 395 U.S. 444 (1969)	25, 28
Branti v. Finkel, 445 U.S. 507 (1980)	17, 35
Bridges v. California, 314 U.S. 252 (1941)	28
Brown v. Oklahoma, 408 U.S. 914 (1972)	26
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	26
Charnock's Case, 91 Eng. Rep. 533 (K.B. 1695-96)	39
City of Watseka v. Illinois Public Action Council, No. 86-631, slip op. (U.S. Jan. 20, 1987)	27
Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973)	36
Cohen v. California, 403 U.S. 15 (1971)	25, 28, 29
Cole v. Richardson, 405 U.S. 676 (1972)	34
Connick v. Myers, 461 U.S. 138 (1983)	*passim*
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	36
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)	27
Elrod v. Burns, 427 U.S. 347 (1976)	17, 35
Frohwerk v. United States, 249 U.S. 204 (1919)	29
Garrison v. Louisiana, 379 U.S. 64 (1964)	27
Garrity v. New Jersey, 385 U.S. 493 (1967)	37

TABLE OF AUTHORITIES—Continued

	Page
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)	27
Goldman v. Weinberger, 106 S. Ct. 1310 (1986)	37
Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1789 (1986)	33
Gooding v. Wilson, 405 U.S. 518 (1972)	26
Healy v. James, 408 U.S. 169 (1972)	30
Hess v. Indiana, 414 U.S. 105 (1973)	25
In re Primus, 436 U.S. 412 (1978)	27
Kelley v. Johnson, 425 U.S. 238 (1976)	37
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	30, 34
Miller v. California, 413 U.S. 15 (1973)	26
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	31
NAACP v. Button, 371 U.S. 415 (1963)	36
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	21, 25, 27, 28, 30
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	21, 22, 26, 30, 40
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)	27
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	30
Papish v. Board of Curators, 410 U.S. 667 (1973)	28, 30, 34
Pennekamp v. Florida, 328 U.S. 331 (1946)	14
Perry v. Sindermann, 408 U.S. 593 (1972)	30
Pickering v. Board of Education, 391 U.S. 563 (1968)	30, 31, 32
Pine's Case, 79 Eng. Rep. 703 (K.B. 1628)	39
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	26, 28
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	36
Shelton v. Tucker, 364 U.S. 479 (1960)	34, 36
Speiser v. Randall, 357 U.S. 513 (1958)	30
Stanley v. Georgia, 394 U.S. 557 (1969)	39
Terminiello v. Chicago, 337 U.S. 1 (1949)	28

TABLE OF AUTHORITIES—Continued

	Page
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)	37
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	14
Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981) (en banc), *cert. denied*, 455 U.S. 909 (1982)	33
Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180 (1985)	41
Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982)	33
Watts v. United States, 394 U.S. 705 (1969)	16, 22, 23, 25, 40
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	34
Wieman v. Updegraff, 344 U.S. 183 (1952)	30, 34, 39
Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984)	32
Constitutional Provisions	
Art. III, § 3	40
First Amendment	*passim*
Fourteenth Amendment	1, 2, 19, 41
Statutory Provisions	
5 U.S.C. § 7324(b)	36
18 U.S.C. § 871	22
42 U.S.C. § 1983	2
FED. R. CIV. P. 52(a)	14
Alien & Sedition Act, 1 Stat. 596 (1798)	39
TEX. REV. CIV. STAT. ANN. art. 6879a (Vernon 1960 & Supp. 1986)	3
Statute of Treason, 1350, 25 Edward 3, Stat. 5, ch. 2	39
Miscellaneous	
W. BLACKSTONE, COMMENTARIES	39
Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965)	27
Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941)	39

TABLE OF AUTHORITIES—Continued

	Page
W. CROTTY, ASSASSINATIONS AND THE POLITICAL ORDER (1971)	38
M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1966)	40, 41
THE FEDERALIST (C. Rossiter ed. 1961)	40
Houston Chron. Apr. 3, 1981	9
J. F. KIRKHAM, S. G. LEVY, & W. J. CROTTY, ASSASSINATIONS AND POLITICAL VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969)	38, 39
A. MEIKLEJOHN, POLITICAL FREEDOM (1960)	27
S. OATES, LET THE TRUMPETS SOUND: THE LIFE OF MARTIN LUTHER KING, JR. (1982)	38
U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (106th ed. 1986)	19
Wash. Post, May 16, 1972	38
Wash. Post, Mar. 31, 1981	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2068

WALTER H. RANKIN, *et al.*,
Petitioners,

v.

ARDITH S. MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; or deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is an action brought by respondent Ardith S. McPherson against petitioners Walter H. Rankin and Harris County, Texas, pursuant to 42 U.S.C. § 1983. Ms. McPherson alleges that she was discharged from her position as an employee of Harris County by petitioner Rankin in violation of her rights secured by the First and Fourteenth Amendments. She seeks reinstatement, backpay, and other equitable relief (J.A. 9-16).

Petitioner Rankin is the elected Constable of one of eight precincts serving Harris County (J.A. 55-56). In Houston and substantially all of the remaining areas within Constable Rankin's precinct, municipal police departments—and not the constables' offices (J.A. 70)—are responsible for the day-to-day enforcement of the criminal laws (J.A. 56-57). Constable Rankin's office does not patrol the streets (J.A. 62). The major function of his office is to serve civil process in the Harris County courts, including juvenile and mental health proceedings (J.A. 60-61, 67-68). Over 80% of the office budget is devoted to these tasks (J.A. 62). The office also provides bailiffs for the local justice of the peace courts, which have civil jurisdiction and also jurisdiction to try misdemeanors

with a maximum fine of $200 (J.A. 63). In practice, such minor misdemeanors are generally tried in the local municipal court systems rather than in the justice of the peace courts (J.A. 65-66).

Constable Rankin employs 16 to 17 computer terminal operators (J.A. 73). Like all employees in the office, and pursuant to Texas law,[1] their official title is Deputy Constable (J.A. 38, 70).[2] They are not, however, required to be commissioned peace officers (J.A. 73-74). Their actual responsibilities consist of typing data recording the service of civil process into the memory of an office computer system (J.A. 79). The room in which they work is isolated from the general public (App. 25a),[3] and there is an "authorized employees only" sign on the door (Tr. 51; *see also* App. 4a, 25a). Constable Rankin enters this part of the office only twice a week (App. 27a).

Ms. McPherson is a black woman (App. 3a). She attended one year of college, studying secretarial science, and moved to Houston in July 1980 (App. 3a-4a). At that time, she was 19 years old (*see* Pl. Ex. 3A, J.A. 27, Tr. 8). She was unable to find a job until January 1981, when she began work as a clerk/typist in Constable Ran-

---

[1] *See* TEX. REV. CIV. STAT. ANN. art. 6879a (Vernon 1960 & Supp. 1986).

[2] Ms. McPherson's certificate of deputation was apparently never executed by the county clerk (Pl. Ex. 1, R. 131, Tr. 8).

[3] The Joint Appendix does not include the trial testimony of Ms. McPherson or that of her coworker, Lawrence Jackson, both of which are part of the record before this Court. For the Court's convenience, we have reprinted that testimony as an appendix to this brief. References to this appendix are designated "App. ——." References to "R. ——" are to volume I of the record in this Court. References to testimony at the summary judgment hearing are designated "SJ Tr. ——"; this transcript is volume II of the record in this Court. References to testimony at trial not included in the appendix to this brief or the Joint Appendix are designated "Tr. ——"; this transcript is volume III of the record in this Court.

kin's office (App. 3a-4a). In applying for her job, she completed a one-page "application for, and contract of, employment." At the foot of this document was a preprinted "oath of office," stating that the applicant "will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and this State." In completing her application, Ms. McPherson signed this oath (J.A. 27; App. 19a-20a).

Ms. McPherson was not a commissioned peace officer (J.A. 76-77) and was not permitted to carry a gun (App. 5a). The only test she took to qualify for her job was a typing test (App. 3a; J.A. 100; *see* Pl. Ex. 1, R. 133, Tr. 8). She received no law enforcement training, or any training other than two days of computer training (J.A. 76-77; App. 5a). Contrary to the suggestion of the United States as *amicus curiae* (U.S. Br. 2), she did not have a telephone on her desk, and never spoke with the public in the course of her job (App. 4a).[4] She was initially employed at the rate of $1,079 per month (Pl. Ex. 1, J.A. 27, Tr. 8). Effective March 1, 1981, her salary was increased to $1,208 per month (Pl. Ex. 1, J.A. 28, Tr. 8). At the time of her discharge, Ms. McPherson had two weeks remaining in her 90-day probationary period (J.A. 36).

On March 30, 1981, Ms. McPherson and the three other computer operators in the office were listening to the radio, as permitted by their employer (J.A. 79; App. 7a, 28a). Heidemarie Cornelison and Tina Richardson were taking their lunch break in the office (App. 6a). Ms. McPherson and Lawrence Jackson, who had become

---

[4] Occasionally, an attorney visited Constable Rankin's office to ensure that service of process was recorded properly. While the record is unclear whether such attorneys ever entered the computer room in contravention of the sign (J.A. 78-79; App. 4a), Ms. McPherson herself never dealt with attorneys during these visits (App. 4a).

her boyfriend (App. 4a),[5] were entering data at their terminals, situated a few feet away from each other (App. 6a, 25a). While they were working, they heard an initial report on the radio that there had been an assassination attempt on President Reagan in Washington, D.C., but that he had escaped unharmed (App. 6a, 28a).[6] The people in the office were shocked by the news of the assassination attempt (App. 28a). The whole room went silent (SJ Tr. 14).

At some point before or during this news report, Captain John M. LeVrier entered the room (Tr. 51-53). Captain LeVrier did not supervise the computer operators (Tr. 50). His primary job was to deliver court papers from Constable Rankin's office to other precincts (Tr. 50). He began talking to Ms. Cornelison and Ms. Richardson (App. 7a). At one point, Ms. Cornelison also began discussing the attempted assassination with a friend on the telephone (SJ Tr. 39, Pl. Ex. 5, Tr. 8; Affidavit of Heidemarie Cornelison (Mar. 30, 1981), Pl. Ex. 2, R. 140, Tr. 8).

Ms. McPherson could not see Captain LeVrier, who was obscured by the dividers on the side of her desk and terminal (App. 30a). She had her head down, and thought that he had left the room (App. 7a).

In response to the news report, Ms. McPherson and Mr. Jackson began discussing who might have been responsible for the attempted assassination (App. 8a). Ms. McPherson and Mr. Jackson spoke only to each other, in what both considered to be a private conversation (App. 9a, 29a). Ms. Cornelison did not hear their con-

---

[5] Ms. McPherson and Mr. Jackson were married on October 18, 1985, following the trial in this case.

[6] *See also* Pet. Br. 5 (report that President was "apparently uninjured"). This initial news bulletin was obviously in error. President Reagan had actually been seriously wounded by John W. Hinckley, Jr. *See* Wash. Post, Mar. 31, 1981, at A1, col. 1.

versation (App. 11a-12a; SJ Tr. 39, Pl. Ex. 5, Tr. 8; Affidavit of Heidemarie Cornelison (Mar. 30, 1981), Pl. Ex. 2, R. 140, Tr. 8). Nor, apparently, did Ms. Richardson (App. 6a-7a).[7]

Ms. McPherson initially observed that "I felt that that would happen sooner or later" (App. 8a). Mr. Jackson agreed (App. 8a). When asked at the trial what her next comment was, she responded:

> Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

(App. 8a). Mr. Jackson responded that the Reagan Administration had been reducing medicaid and food stamps assistance (App. 8a-9a, 28a). Ms. McPherson noted that the same had been true of welfare and CETA programs, and said to Mr. Jackson, "[S]hoot, if they go for him again, I hope they get him" (App. 8a; *see* App. 9a, 29a; Tr. 54).

Captain LeVrier overheard only Ms. McPherson's last remark (Tr. 55). He approached her and said, "Surely you don't mean that" (Tr. 56; *see* App. 10a). At that point, she looked up at him in surprise, because she thought that he had left the room (App. 10a, 30a). There is a dispute in the record as to how Ms. McPherson responded to Captain LeVrier's remark. She and Mr. Jackson testified that she said nothing (App. 10a, 30a).[8] Captain LeVrier testified that "she said, oh yes, I do [mean it]" (Tr. 56).

Ms. McPherson then resumed her duties (App. 10a). Captain LeVrier left and related Ms. McPherson's com-

---

[7] Ms. Richardson was not a witness at either the summary judgment hearing or the trial.

[8] Ms. McPherson testified that she "just looked up at him and smiled" (App. 10a).

ment to his immediate superior, who immediately related it to Constable Rankin (Tr. 57). Constable Rankin then called Captain LeVrier into his office, and Captain LeVrier "told him exactly what I had heard her say" (Tr. 58). Constable Rankin did not ask him anything about the context of the remark, whether it was overheard by others, or to whom it was made (J.A. 82). Within five to ten minutes of her initial exchange with Captain LeVrier, Constable Rankin summoned her to his office (J.A. 82; Tr. 63). He also asked Captain LeVrier and Chief Deputy Constable Jack Abercia to join him (J.A. 82; Tr. 63).

Although Constable Rankin had interviewed Ms. McPherson when she had applied for a job (App. 3a), this was the first time since she had begun work that she had ever spoken to him in his office (App. 5a-6a). He directed her to sit down (App. 10a). He asked her if she had made the remark, and she admitted that she had (J.A. 82; App. 11a). Accounts of the next part of the conversation are disputed. Ms. McPherson testified that he then asked Captain LeVrier what he thought she had meant by the remark, and that LeVrier replied: "I don't think she meant anything by it. She just didn't know how it sound[ed] when she said it" (App. 11a). Constable Rankin testified, however, that he asked her, "do you mean it?" and that "she said, yes" (J.A. 82-83). Captain LeVrier agreed (Tr. 59). Chief Deputy Abercia did not recall such an exchange (Tr. 63).[9] Ms. McPherson was never asked at the trial whether she had said to Constable Rankin that she had meant her remark; at the summary judgment hearing, she testified

---

[9] At the February 1983 summary judgment hearing, Chief Deputy Abercia testified that he was present during the questioning, and that "I don't recall" whether Constable Rankin asked her "if she meant that statement" (SJ Tr. 57-58). At the trial, some two years later, he again testified that he did not recall such an exchange, but that "about that time someone called me to the door" (Tr. 63).

that she told him, "Yes, but I didn't mean anything by it" (SJ Tr. 18).

According to Ms. McPherson's testimony, Constable Rankin said, "I just won't tolerate that in here. It's a public service office, and we for Reagan [sic], and some other stuff he was saying" (App. 11a).[10] He then got up, issued instructions to have her fired immediately, and left the room (J.A. 86; Tr. 59, 64; App. 11a). He did so without asking or knowing to whom or in what context she had initially made the remark (J.A. 82), and solely based "on what was made to me direct":

> I was not conc[e]rned who she had made it to, because she had made it to me, and when she made the remark to me, then I lost all confidence at all that I could ever be comfortable in a law enforcement office and agency . . . .

(J.A. 83. *See also* J.A. 92 ("I have to be comfortable with the people I work with"), 101, 103). He had no knowledge of whether the remark had disrupted any work in the office (J.A. 84-85), and did not care one way or the other:

> I did not base my action on whether the work was interrupted or not. I based my action on a statement that was made to me direct.

(J.A. 86). In fact, the conversation between Ms. McPherson and Mr. Jackson caused no impact on the work of the other employees in the office (J.A. 85-86). As noted above, Ms. Cornelison (and apparently Ms. Richardson) never heard it. Indeed, even Mr. Jackson had made nothing of his conversation with Ms. McPherson; he testified that he was "shocked" to learn that she had been fired over a remark that he had nearly forgotten (App. 31a).

---

[10] *See also* SJ Tr. 18 ("And he said, 'we are for Reagan and we support Reagan' ").

Constable Rankin appeared on a television news program the night he fired Ms. McPherson (App. 13a). He also called the United States Secret Service that day, and recommended that they investigate Ms. McPherson (J.A. 84).

On the following day, Ms. McPherson came to the office and requested an interview with Constable Rankin, because "I wanted to explain myself" (App. 12a; *see also* J.A. 84). He refused to see her, because "I didn't have anything else to discuss with her" (J.A. 84). On the day after Ms. McPherson was fired, television reporters sought to interview her, but she declined to appear on television (App. 13a). Two days later, newspaper reporters interviewed her (App. 12a-13a). She admitted to them that she had made the statement at issue (Houston Chron., Apr. 3, 1981, § 1, at 4, col. 1, Pl. Ex. 9, Tr. 8; *see* R. 1c).[11] The local newspaper quoted her as saying:

> I was talking to someone about Reagan's (proposed) cutbacks (in some social and welfare services)—how it was going to affect the poor people. I was getting angrier and angrier . . . . I wasn't serious about killing Reagan. I don't wish death on anyone.

(*Id.*). On the same day that the newspaper called Ms. McPherson, the Secret Service interviewed her. After the interview, they told her that "they were sorry," that "they knew it was a prank call," but that "they just have to come out and investigate" (App. 13a-14a).[12]

After Ms. McPherson was fired, she was unable to find another job until July 1981, when she obtained employ-

---

[11] Constable Rankin was also interviewed (Houston Chron., Apr. 3, 1981, § 1, at 4, col. 1, Pl. Ex. 9, Tr. 8; *see* R. 1c).

[12] Ms. McPherson was never prosecuted by the United States Department of Justice, or by any other law enforcement authority. The United States concedes in its brief as *amicus curiae* that "we do not think that [her] remark could [constitutionally] be criminalized" (U.S. Br. 8).

ment at a local shoe store (App. 16a). She was laid off in January 1983, and received unemployment compensation at the rate of $94 a week (App. 16a). At the time of the trial in January 1985, she was working for a temporary secretarial agency (App. 17a).

Procedural History

Ms. McPherson filed her complaint in June 1981.[13] At the close of a hearing on cross-motions for summary judgment, the district court ruled from the bench in favor of the defendants (SJ Tr. 73-74).

Two months later, the district court issued findings of fact and conclusions of law (J.A. 35). These findings did not include any reference to any security work by Harris County constables. The court found that Ms. McPherson's comment "did not disrupt the workplace in general" (J.A. 42). However, "regardless of the seriousness of [her] intent," the court found that her statement overheard by Captain LeVrier "indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee" (J.A. 39). It further found that Constable Rankin "sincerely and earnestly believes" that one with Ms. McPherson's attitude "is not a suitable employee of a law enforcement agency" (J.A. 39). It concluded that the comment "in no way served the public's interest in matters of general concern" (J.A. 42), and that Constable Rankin "maintains a strong interest in retaining only those deputies who possess and publicly manif[e]st qualities of character that accentuate the high standards of the field of law enforcement" (J.A. 43). Accordingly, the district court held that Ms. McPherson's First Amendment rights were not violated by her discharge (J.A. 43).

The Fifth Circuit vacated and remanded for a full trial on the merits (J.A. 44). It noted the clear factual

---

[13] There has never been a state court proceeding involving Ms. McPherson's discharge.

dispute as to whether Ms. McPherson had meant "what she said" (J.A. 48-49, 51). Applying this Court's intervening decision in *Connick v. Myers*, 461 U.S. 138 (1983), the Fifth Circuit concluded that there was a genuine issue of material fact concerning the content, form, and context of Ms. McPherson's speech, and thus that summary judgment had been inappropriate (J.A. 49-50).

On remand, the parties agreed that a critical but disputed factual question was the meaning in context of Ms. McPherson's final remark (Tr. 4-8). As the district court observed:

> I suppose I took the position at the hearing that it really didn't make any difference what her intent was. I think that's where the Fifth Circuit finds me at fault. I took the position that she was working in a public position for a public official, and what she said was grounds for discharge, regardless of the content and circumstances.

(Tr. 7). At the one-day trial, as noted above, the parties provided conflicting testimony as to what Ms. McPherson told Captain LeVrier and Constable Rankin about the meaning of her remark. Ms. McPherson also testified that she did not hope and had not hoped that someone would actually kill the President (App. 9a). She explained that her remark was "just the end of the conversation . . . . It doesn't mean that I want the man dead" (App. 9a; *see also* App. 23a). At the conclusion of her cross-examination, the district court pointedly asked her:

> Q And you just meant to say that you were unhappy with President Reagan?
>
> A Right. I just disagreed with his policy.

(App. 23a).

At the conclusion of the trial, the district court again ruled from the bench (J.A. 116-21). The court found

that "by words or deeds, [Ms. McPherson] conceded having said those words to [Captain LeVrier and Constable Rankin], and made no attempt to retract them" (J.A. 117). Despite the Fifth Circuit's mandate, the court observed that "I'm not sure that the real question in this case is what [Ms. McPherson] meant" (J.A. 117). It concluded that Constable Rankin was entitled to "judge [her] words by their ordinary English context" (J.A. 118). It rejected Ms. McPherson's trial testimony as to what she had meant, but its findings as to what she *did* mean were vague and imprecise:

> I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public governmental official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

(J.A. 119).

The district court then held that Constable Rankin was entitled to be "very concerned about the character and trustworthiness of the people in his office" (J.A. 119). In this second decision, the court found the constable's alleged concerns about security matters to be "far less significant in his motivation" (J.A. 119).[14] In the court's view, the concluding remark indicated to Constable Rankin that the speaker "was the kind of person who would be a bad employee, would be a negative influence in the office" (J.A. 119-20). The district court concluded that "I do not believe that that is protected speech," and entered judgment for the defendants (J.A. 120, 122).

---

[14] The court had warned counsel for petitioners, "I hope you are not going to stress too much her position as a quasi-secret service agent" (J.A. 112).

The Fifth Circuit reversed a second time, once again based upon this Court's opinion in *Connick*.[15] It held that the threshold question was whether Ms. McPherson's remarks addressed "matters of public concern" (J.A. 128-29). In analyzing this question, it recognized that a public employee could not constitutionally be fired merely for criticizing President Reagan's social and economic policies; the difficulty, it observed, is that in this case Ms. McPherson "chose such a repulsive, nigh obscene, manner of making her criticism" (J.A. 129). The Fifth Circuit nevertheless concluded that Ms. McPherson's remarks, including the offensive one, dealt with "matters of public concern" under the *Connick* rule (J.A. 130, 133-34). It then proceeded to a balancing of First Amendment and governmental interests.

Contrary to the suggestion of the United States as *amicus curiae* (U.S. Br. 23 n.2), the Fifth Circuit found that Constable Rankin's precinct "has no direct law enforcement role" (J.A. 130). And in doing so, it relied explicitly on the fact that "the district judge did not regard . . . as a serious suggestion" Constable Rankin's unexplained "hint[] that his office might somehow participate in providing security during presidential visits to Houston" (J.A. 131). *See* note 14 *supra*. The court also found that Ms. McPherson herself "played an entirely clerical role" (J.A. 131).

The Fifth Circuit recognized "our duty to make 'an independent constitutional judgment on the facts of the case' " (J.A. 132 (quoting *Connick*, 461 U.S. at 150 n.10)), and to " 'examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character

---

[15] The Fifth Circuit's opinion was initially filed on March 19, 1986 (J.A. 123). On April 16, 1986, the court *sua sponte* amended its opinion, adding footnote 2. Memorandum to Counsel from Office of the Clerk, United States Court of Appeals, Fifth Circuit, Apr. 16, 1986.

which the principles of the First Amendment . . . protect' " (J.A. 132 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). In attempting to reconcile this independent obligation with the "clearly erroneous" standard of FED. R. CIV. P. 52(a), the Fifth Circuit concluded that "when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain" (J.A. 133). Ultimately, however, the court appeared to apply the clearly erroneous standard, at least *arguendo*. It accepted what it characterized as the district court's conclusion "that McPherson actually hoped that the President would be assassinated" (J.A. 132). It said that the district court's inference, drawn from "the inevitably ambiguous response to the question, 'Did you mean it?' ", was based upon "a slender but adequate reed." Accordingly, it concluded, "we are not left with the firm belief that a mistake was made" (J.A. 133).[16] Apparently, however, it accepted this inference only *arguendo*, because it then decided that:

> Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern.

(J.A. 134).

Next, following the *Connick* rule, the court balanced Ms. McPherson's right to express her beliefs on a matter of public concern, "however loathsome," against Constable Rankin's "important and legitimate government interest" in employing "only those individuals who have no serious reservations about the fundamental mission of the

---

[16] Although the Fifth Circuit did not so state, this conclusion was a paraphrase of this Court's articulation of the "clearly erroneous" standard. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

agency" (J.A. 134-35). It emphasized the absence of any disruption caused by Ms. McPherson's private conversation, or any evidence that her remark "threatened the future efficiency or morale of the office" (J.A. 134). Because her duties "were so utterly ministerial and her potential for undermining the office's mission so trivial," it held that she could not "constitutionally be fired for her expression of political opinion":

> The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

(J.A. 136). The Fifth Circuit reversed, and remanded the case "for determination of an appropriate remedy" (J.A. 136). This Court then granted certiorari.

SUMMARY OF ARGUMENT

This is a hard case, because of our adverse reaction to anyone who carries disapproval of a public official's policies to the point of such a distasteful remark as Ms. McPherson's. But it is a paradigm of the maxim that hard cases can make bad law. To uphold this state sanction against her private expression on a matter of public concern would open the door to an Orwellian police power over the political views of all public employees, who comprise 15% of the nation's work force.

While Ms. McPherson's remark was deplorable, we defend her constitutional right to make it in the context of the other thoughts she expressed under the stress of the moment. This Court has never upheld a state sanction against a "nonpolicymaking, nonconfidential" public employee for the private expression of a political view that was not unlawfully obscene, libelous, or otherwise illegal, and that did not harm office efficiency, morale, or discipline. It should not do so now.

I

The Court has acknowledged its duty, when reviewing a claimed abridgment of First Amendment rights, to make its own independent review of the facts, including the content, form, and context of the speech the state would punish. Such an examination shows that Ms. McPherson's initial reaction to the shocking news of the assassination attempt was to infer that it must have been done by a black person because of Administration policies she regarded as harmful to most of "my kind." She expressed these thoughts privately to the black employee at the adjacent work station, who agreed with her criticism. She conveyed the depth of her disapproval of these policies by stating to him: "If they go for him again, I hope they get him." This was pure political hyperbole, somewhat milder than the remark this Court found immune from prosecution in *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam), where an anti-Vietnam protester said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."

Ms. McPherson's final remark, but not the preceding statements that formed the relevant context, was overheard by a higher ranking employee of whose presence Ms. McPherson was not aware. He reported it to the constable, who summoned Ms. McPherson to confirm to him whether she had made the remark and whether she meant it. The testimony as to her reply is conflicting, but the District Court found that "by word or deeds, she conceded having said those words to them and made no attempt to retract them" (J.A. 117). When she tried to see the constable the next day to explain she had not meant the remark, he refused to see her.

On these "constitutional facts," Ms. McPherson's remarks, including the final one, were clearly addressed to her disapproval of the Administration's policies—a matter of obvious public concern—and are clearly protected. They fall well outside the categories of speech to

which this Court has denied protection, such as obscenity, certain types of libel, "fighting words," and unlawful threats to harm the President. Despite the deplorable nature of the concluding comment, the remarks taken as a whole lie well within the First Amendment's core values. As this Court has long recognized, the offensive nature of political speech does not deprive it of First Amendment protection.

II

As the parties to this case all agree, it is not a condition of public employment that one waive his constitutional rights. Moreover, under this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), nonconfidential, nonpolicymaking public employees cannot be fired merely for their political views.

Under *Connick v. Myers*, 461 U.S. 138 (1983), protected speech of a public employee on a matter of public concern may be balanced against the government's interest in the efficiency of the public service and in employee morale and discipline. While these governmental values may sometimes outweigh an employee's interest in uttering protected speech, they can only do so when the speech impairs efficiency, morale, or discipline. Unless such an impairment can be shown, they cannot outweigh private remarks to a single fellow employee that express protected political views on a matter of public concern. As the court of appeals found, the constable "specifically denied having fired [Ms. McPherson] because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office" (J.A. 125).

Constable Rankin and the United States argue that a law enforcement office can dismiss an employee who expresses sympathy with the commission of any unlawful act, and that Ms. McPherson did so here. At most, Ms. McPherson was emphasizing how out of sympathy she

was with the President's policies, rather than expressing a sympathy for lawbreaking as such. Such remarks are not unusual in the emotional shock that follows an unlawful act of violence against a controversial public figure. Similar outbursts occurred immediately after the attempts on the lives of Governor George Wallace and Dr. Martin Luther King, Jr. Many public employees, including employees of law enforcement agencies, were probably among those making such remarks. Such reactions may well be deplorable, but they bear no reasonable relationship to a public employee's fitness for a nonpolicymaking, nonconfidential position. They create no governmental interest outweighing the First Amendment rights of such employees.

These examples cannot be separated in principle from the facts of this hard case. This Court should not permit the dismissal of a nonpolicymaking, nonconfidential employee for a deplorable private remark made in a moment of shock on a matter of public concern, but without any effect on the efficiency, morale, or discipline of her office.

ARGUMENT

The hyperbole involved in this case is not confined to Ms. McPherson's deplorable remark. The brief of the United States as *amicus curiae* contains considerable hyperbole of its own. It mischaracterizes the record and findings of two lower courts here as a case involving "unflinching approval of and unabashed desire for the assassination of the President" (U.S. Br. 7, 9, 11) by one who "openly" and "stubbornly" expressed her political opinion (U.S. Br. 8, 9, 11, 20), "refuse[d] to retract" it, and "reiterated it in a closed-door discussion" with her superior (U.S. Br. 8, 18), in which she "dug in her heels" and "insisted" that she meant what she said (U.S. Br. 24). It describes this as conduct "verging on insubordination" (U.S. Br. 24) that was "not more than one step removed from . . . fighting words" (U.S. Br.

17) and that ultimately threatened the public "appearance" and "reputation" of her employer (U.S. Br. 21, 22-23, 24, 26), a police agency that "depends on the public for tips about criminal activity" (U.S. Br. 23).

Stripped of this hyperbole, the actual record before this Court shows a far different case. Ms. McPherson's remark was made at the time of a shocking event, in a purely private conversation with a close personal friend, and was one that she has testified and demonstrated was never meant literally. While the remark was deplorable, she had a constitutional right to be free of sanctions for making it at the time and place and in the context of its utterance. Taken in context, it was an utterly harmless expression of her deeply felt political beliefs concerning Administration policies directly affecting "most of my kind." To rule that the First and Fourteenth Amendments do not protect an isolated emotional expression of her political thoughts in a moment of great stress would open the door to government sanctions against public employees (who comprise 15% of the national work force[17]) over a boundless range of private expressions of their political beliefs.

I. MS. McPHERSON'S PRIVATE CONVERSATION CRITICIZING GOVERNMENT POLICIES WAS AN EXPRESSION OF POLITICAL BELIEFS THAT WAS CLEARLY DIRECTED TO MATTERS OF PUBLIC CONCERN AND IS ENTITLED TO FIRST AMENDMENT PROTECTION.

In this case, the Fifth Circuit found Ms. McPherson's speech to be "evoked by and addressed to serious matters of public concern," whether it was a "hyperbolic expres-

---

[17] U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 294, 393 (106th ed. 1986) (1984 data). Even criminal justice employees (police, courts and correction) number more than one million. *Id.* at 403 (1982 data). While no precise figures are available, it seems likely that the number of public employees engaged in all types of law enforcement (criminal, civil, and administrative) is of the order of five million.

sion of unhappiness with the President's policies, or an actual wish for his assassination" (J.A. 133-34). The United States disagrees. It wrongly asserts that Ms. McPherson's statement—"if they go for him again, I hope they get him"—was "separate from and no part of her expression of 'disapproval of the President's policies,'" simply because that statement alone was later reported out of context to Constable Rankin and then acknowledged by Ms. McPherson (U.S. Br. 18). It then argues that "expression favoring the President's assassination" does not relate to "a matter of public concern" (U.S. Br. 15-19).

This argument would make a virtue of Constable Rankin's failure to learn the context of Ms. McPherson's remark and his refusal to see her when she returned the next day to explain it. *See* pages 7-9 *supra*. In fact, when placed in its actual context, as this Court's decisions require, and as Ms. McPherson testified at trial, her remark was at worst a highly regrettable form of hyperbole, uttered at the conclusion of a conversation in a moment of unusual stress to illustrate how strongly she disagreed with policies of the federal government that directly affected "most of my kind" (App. 8a). But even if it were "something more," as the district court broadly and imprecisely suggested, it was part of a private expression of views on a matter of public concern that is protected by the First Amendment.

A. This Court Must Exercise Its Independent Judgment to Ascertain the Meaning and Significance of Ms. McPherson's Conversation.

This Court has made clear that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In its

first hearing, held before *Connick* was decided, the district court granted summary judgment without considering the context in which Ms. McPherson made her statement, and without determining her intent or meaning. The Fifth Circuit reversed, citing *Connick* (J.A. 48-49).

Despite a specific mandate from the court of appeals (J.A. 52), on remand the district court essentially avoided answering the question of what Ms. McPherson had meant by her remark—even though the court had expressly asked her that question at trial (App. 23a). While the district court did conclude that her statement was "something more than political hyperbole" (J.A. 119), it did not determine what that something more actually was. The best the Fifth Circuit could make out of this murky finding was that the district court was "*apparently* persuaded that [Ms. McPherson] was fired because she honestly hoped that any future assassination attempt would be successful" (J.A. at 130 (emphasis added)). It said, apparently *arguendo*, that under the clearly erroneous standard and on the basis of "a slender but adequate reed," such a finding would not be clearly erroneous (J.A. 133), but it decided the case on a ground that made it unnecessary to make an independent examination of its own (*see* pages 13-15, *supra*).

We respectfully submit that this Court should, as a threshold matter, make the findings of constitutional fact that the two courts below declined to make concerning the content, form, and context of Ms. McPherson's remark. As the Court has long recognized, its "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n.50 (1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). In First Amendment cases, the Court has said it will "examine for ourselves the statements in issue and the circumstances under which they were made" to see whether the

statements are constitutionally protected. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). In *Connick*, the Court conducted just such an examination to determine whether a public employee's speech, in the light of its content, form, and context, did or did not relate to a matter of public concern. *See* 461 U.S. at 150 & n.10. In our submission, a comparable examination should be made here, and would show that Ms. McPherson's conversation—including her highly regrettable concluding remark—was clearly related to matters of public concern and entitled to protection.

B. An Independent Examination of the Content, Form, and Context of Ms. McPherson's Statement Compels the Conclusion That It Was a Protected Form of Political Hyperbole.

Ms. McPherson's challenged statement is milder than that involved in *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). Watts took part in a rally on the Washington Monument grounds protesting American involvement in the Vietnam War. He referred to his upcoming physical examination for the draft and then stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. This Court reversed Watts' conviction under 18 U.S.C. § 871 for threatening the life of the President. Interpreting that statute against the "background" of the First Amendment's protection of political speech, the Court concluded:

> We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 708.

This conclusion is equally applicable here. Ms. McPherson's statement, like that in *Watts*, was not meant literally. As she testified, "It doesn't mean that I want the man dead" (App. 9a). The "content, form, and context, . . . as revealed by the whole record,"[18] demonstrate that she intended her statement only to illustrate how strongly she "disagreed with [the President's] policy" (App. 23a). Contrary to the suggestion of the United States, it was part and parcel of a discussion of those policies of the Reagan Administration and their effect on "most of my kind" (App. 8a). Ms. McPherson testified similarly at the summary judgment hearing that "I was angry because I felt like maybe one day I might be one needing [public assistance or welfare]" (SJ Tr. 16). In fact, she ultimately did need to depend on unemployment assistance for a short time (App. 16a). Her snap remark cannot be wrenched from its political context simply because Constable Rankin was unaware of that context when he fired her.

Constable Rankin and Captain LeVrier testified that Ms. McPherson told them that she "meant" her final remark (J.A. 82-83; Tr. 59). Deputy Chief Abercia, however, could recall no such statement by her.[19] Ms. McPherson and Mr. Jackson (the only person to whom she was speaking and the only person who heard the entire conversation in full context) testified that she did not mean it (App. 9a, 11a, 29a). It is clear from the district court's two opinions in this case that it was unwilling to accord any probative value to the testimony of Constable Rankin and Captain LeVrier on the point. The court never found that she said that she meant the remark, and never found what she did mean by it, except that it was "something more" than hyperbole (J.A. 119).

---

[18] *Connick*, 461 U.S. at 147-48.

[19] *See* page 7 & n.9 *supra*.

In any event, as the Fifth Circuit recognized, there would be little significance to any "inevitabl[e] ambiguous response" to the question, "Did you mean it?" (J.A. 133). Whatever she said about her remark in the period of stress during and immediately after the time she made it, Ms. McPherson squarely answered the district court's question at trial by testifying that her statement to Mr. Jackson was meant only to convey to him the intensity of her political views: "I just disagreed with [President Reagan's] policy" (App. 23a). Ms. McPherson's actions on the day after her firing clearly corroborate this testimony. She returned to Constable Rankin's office three times that day to explain to him that she had not meant any harm toward the President. She waited there for several hours, and did not give up until finally being told that he did not intend to see her (App. 12a; J.A. 84). This subsequent conduct and testimony is entitled to great weight in assessing the intention of the speaker for First Amendment purposes. In *Bond v. Floyd*, 385 U.S. 116, 133-34 (1966), this Court relied upon very similar supplementary statements as a "clarification" that expressions of sympathy for law violators—in that case, draft evaders—did not constitute an incitement to lawbreaking justifying exclusion from a state legislature.

Petitioner's strained arguments about Ms. McPherson's regrettable remark ignore reality, and are inconsistent with *Connick*. Ms. McPherson's statement was made moments after hearing the first radio report that there had been an attempted assassination of the President. News of such a shocking and tragic event deeply affects all people throughout the country, whatever their political views. It inevitably caused a strong emotional reaction in everyone who heard the news; as Ms. McPherson testified, "the whole room went silent." *See* page 5 *supra*. Ms. McPherson's statement was made while she was still under the emotional shock of hearing the news. A parallel shock impact was apparent in Constable Rankin's re-

sponse. Under the stress of the moment, he became so angry that he fired her without understanding the context of her remark, and without giving her an adequate chance to explain herself, even on the following day.[20]

C. Whatever She Meant by Her Remark, Ms. McPherson's Conversation Was Protected Political Speech on a Matter of Public Concern.

Even if Ms. McPherson could be found to have meant her statement literally, such a hope for the President's death, in the context in which it was made, was clearly protected speech on a matter of public concern. It was certainly not "advocacy" of assassination (U.S. Br. 15, 19, 20), much less incitement to imminent lawless action (J.A. 49 n.5).[21] As this Court noted about the remark in *Watts*,[22] her remark was conditional; she began by saying, "*If* they go for him again . . ." (J.A. 117 (emphasis added)). Its intended recipient, Mr. Jackson, was certainly unmoved to engage in unlawful action; indeed, he thought nothing of the remark and was shocked at her discharge because of it (App. 31a). The abstract expression of a hope that "they" might be successful in the future is deplorable, but it cannot be characterized as advocacy or incitement of "them" to assassination.[23]

---

[20] This draconian response itself raises substantial First Amendment concerns. *See Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159, 3171-72 (1986) (Stevens, J., dissenting). *See also Cohen v. California*, 403 U.S. 15, 19 (1971) (absence of notice that speech would not be tolerated in certain places).

[21] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[22] *See* 394 U.S. at 708 (relying on "the expressly conditional nature of the statement").

[23] *Cf. Hess v. Indiana*, 414 U.S. 105, 108 (1973), in which this Court reversed a conviction for a statement which "at worst, . . . amounted to nothing more than advocacy of illegal action at some indefinite future time." Here, Ms. McPherson did not advocate that Mr. Jackson do anything at any time.

At worst, it was only an expression that she disagreed with the policies of the President and that, at the moment she heard the shocking news of the attempt, she hoped that harm would befall the President in the event that another attempt occurred. She did not say she would make such an attempt herself, as Watts had in the statement this Court held to be mere hyperbole in that case.

Of course, as the United States points out, certain other narrowly limited types of speech have been held not entitled to First Amendment protection. These include "fighting words" which "by their very utterance . . . tend to incite an immediate breach of the peace," [24] certain forms of libelous speech,[25] and obscenity.[26] But Ms. McPherson's expression of political views—including her final remark—was far removed from any of these categories of speech.[27] And it was not a "willful use of scurrilous language calculated to offend [Mr. Jackson's] sensibilities." [28]

---

[24] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *But see Gooding v. Wilson*, 405 U.S. 518 (1972).

[25] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[26] *Miller v. California*, 413 U.S. 15 (1973).

[27] The United States describes Ms. McPherson's statement as "not more than one step removed from . . . fighting words" (U.S. Br. 17). Whatever this characterization means, Ms. McPherson did not direct an "offensive and divisive statement" at an intended listener, as in *Chaplinsky*. Her only intended listener, Mr. Jackson, did not disagree with her political views (App. 8a, 28a-29a). Constable Rankin heard her acknowledge her remark only because it was reported to him out of context and because he demanded that she do so (J.A. 80-83).

[28] *Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting). *Cf. Brown v. Oklahoma*, 408 U.S. 914 (1972) (Powell, J., concurring in the result), in which offensive language similar to that in *Rosenfeld* was used "in a political meeting to which appellant had been invited," in a context in which the language "might have been anticipated by the audience."

Nor was Ms. McPherson's expression of her opposition to the President's policies one that "occupies at best a 'subordinate position in the scale of First Amendment values'" (U.S. Br. 19 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978))). It was not solicitation of accident victims by a member of the Texas bar (U.S. Br. 19 (citing *Ohralik*)).[29] And it was not misinformation about anyone's financial assets and liabilities (U.S. Br. 14-16, 18 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985))). It was a conversation about the political, social, and economic policies of a national Administration, in a private conversation between two close personal friends who believed their "kind" to be profoundly aggrieved by those policies. As this Court has held, such "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Ms. McPherson's statements need not "creep into that highest echelon of the First Amendment hierarchy" (U.S. Br. 25), because they already reside there.[30]

Contrary to the further suggestions of the United States (U.S. Br. 18), Ms. McPherson was not required to shout her political views from a rooftop to entitle her to the protections of the First Amendment. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414-16 (1979). The political views held by citizens of this country are undoubtedly expressed more often and more

---

[29] *Cf. In re Primus*, 436 U.S. 412, 414 (1978) (setting aside disciplinary action for legal solicitation "seeking to further political and ideological goals").

[30] *Claiborne Hardware Co.*, 458 U.S. at 913; *see* A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960); Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11-13 (1965); *see also City of Watseka v. Illinois Public Action Council*, No. 86-631, slip op. (U.S. Jan. 20, 1987), *aff'g* 796 F.2d 1547 (7th Cir. 1986) (regulation of time, place, and manner of political speech requires significant relationship to the government interest and inadequacy of less restrictive alternatives).

freely in private conversations than in public speeches. Permitting the state to impose sanctions on political views whenever expressed privately would be Orwellian indeed.

As the Fifth Circuit recognized, the only distinguishing feature of Ms. McPherson's expression of her political convictions in this case was its "repulsive" reference to a possible future attack by others on the President (J.A. 129). But the mere fact that Ms. McPherson expressed her political views in a way that is offensive to most of us cannot deprive those views of First Amendment protection. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Papish v. Board of Curators*, 410 U.S. 667, 668 n.3 (1973) (per curiam). As this Court has unanimously held, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." [31]

At bottom, this case involves none of the claimed potential incitement, provocation, breach of the peace, or other disruptions which this Court has had to weigh in its prior decisions providing protection to offensive public speech.[32] It involves nothing more than a tasteless private remark made to a close personal friend who was himself not offended by it. The First Amendment extends the freedom "to speak foolishly and without moderation," [33] even for remarks lacking "perfect good taste." [34] For as Justice Harlan observed, and as this case perfectly demonstrates, the government "can[not] forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California*, 403

---

[31] *Claiborne Hardware*, 458 U.S. at 928 (boycott leader's reference to "break[ing] . . . necks" of nonparticipants).

[32] *See Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

[33] *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

[34] *See Bridges v. California*, 314 U.S. 252, 270 (1941).

U.S. 15, 26 (1971).[35] The First Amendment was designed to bar the government from being a censor of public discourse, thereby "putting the decision as to what views shall be voiced largely into the hands of each of us. . . ." Any contrary approach would ignore "the premise of individual dignity and choice upon which our political system rests." *Id.* at 24.

The hyperbolic rhetoric of petitioners and the United States concerning Ms. McPherson's conversation ignores *Connick*'s insistence upon an examination of the "content, form, and context" of speech. It would also return this Court to the long discredited view that "a little breath" of offensive speech might be "enough to kindle a flame" of lawlessness. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919), *cited at* U.S. Br. 16. By permitting Constable Rankin to fire Ms. McPherson based solely on the "ordinary English context" of one remark divorced from the rest of its true context (J.A. 118), the district court in this case made the same error.

II. MS. McPHERSON'S INTEREST IN PRIVATELY EXPRESSING HER OBJECTIONS TO THE POLICIES OF THE FEDERAL GOVERNMENT CLEARLY OUTWEIGHS CONSTABLE RANKIN'S INTEREST IN HAVING "CONFIDENCE" IN HER.

Perhaps to circumvent the clear authority of this Court's prior decisions, the United States next argues that while the First Amendment protects Ms. McPher-

---

[35] *See also Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting):

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; . . . the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .

son's remark from "criminalization" (U.S. Br. 8, 18), it does not protect it against other state sanctions. But the First Amendment applies to all state sanctions against protected freedoms. It forbids injunctions,[36] civil damage judgments,[37] withholding of governmental benefits,[38] and, in the case of public employees, dismissal from the public service—except in the rare case, such as *Connick*, where the government as employer can show a superior interest in the efficient performance of its government functions.

Indeed, it has now long been settled that governments may not condition public employment on a ground that infringes on the constitutional rights of its employees. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).[39] *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), create a narrow qualification to this fundamental principle in the context of the right of free expression of public employees. Those decisions require a balancing of "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency

---

[36] *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

[37] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[38] *See, e.g., Healy v. James*, 408 U.S. 169 (1972) (denial of official recognition of campus organization); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam) (expulsion from university for distributing newspaper found to violate "conventions of decency"); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (revocation of passports of Communist party leaders); *Speiser v. Randall*, 357 U.S. 513 (1958) (limitation of property tax exemptions for veterans).

[39] This doctrine applies to probationary employees such as Ms. McPherson. *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.[40]

In *Pickering*, the Court invalidated a teacher's dismissal for publishing a letter in a local newspaper criticizing the manner in which the board of education had handled past proposals to raise revenue. It found that the letter was not directed towards anyone with whom the employee had day-to-day contact and that in fact it was totally ignored by everyone except for the members of the board of education. *Id.* at 569, 570. The question of maintaining discipline and harmony in the workplace therefore did not arise. *Id.* at 570. On the other side of the balance, the Court found the school system's financial problems to be a "matter of legitimate public concern," *id.* at 571, on which "free and open debate is vital to informed decision-making by the electorate," *id.* at 571-72. The Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

By contrast, in *Connick*, an employee about to be involuntarily transferred to another department distributed a questionnaire at work soliciting the views of her fellow workers on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. She was terminated for creating a "mini-insurrection" in the office, *id.* at 141, 151, and this Court upheld her termination. Because the last of these questions addressed a matter of

---

[40] *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (defendant may show that it would have reached same decision to discipline employee in absence of protected speech). In this case, petitioners concede that Ms. McPherson was fired solely because of the content of her speech (Pet. Br. 5-6). Constable Rankin so testified (J.A. 86).

public concern, the Court engaged in a balancing of interests under *Pickering*. It found that questioning employees about their confidence in their supervisors undermined close working relations in the office, that circulating the questionnaire caused work time to be lost, and that doing so immediately after a dispute with the employee's supervisors evidenced an act of insubordination. *Id.* at 150-54.

As noted above, and in sharp contrast to most of Ms. Myers' questionnaire in *Connick*, the totality of Ms. McPherson's remarks was an expression of her political beliefs concerning the policies of the Reagan Administration that clearly addressed an issue of public concern. Furthermore, both lower courts found that, as in *Pickering*, there was absolutely no disruption of or effect on employee morale as a direct result of Ms. McPherson's statement (J.A. 42, 134). Constable Rankin himself testified that he did not even consider whether the remark had any disruptive effect on the office, and that he did not care one way or the other (J.A. 85, 86). The remark was made in an area largely, if not totally, inaccessible to the public. *See* page 3 *supra*. No one except Mr. Jackson was meant to hear it. Ms. McPherson happened to make the statement at her work station because that was where she was when she heard the shocking news.

Nor did Ms. McPherson's conversation create anything remotely similar to the "mini-insurrection" evident in *Connick*. As in *Pickering*, it did not refer to her supervisor (or even to the office) in any way.[41] Although

---

[41] Ms. McPherson's conversation thus stands in stark contrast to that of the employee in *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984), who was reprimanded for telephoning a fellow employee and saying, "Did you hear the good news?," referring to the termination of their supervisor. The Seventh Circuit upheld her reprimand because her remark reflected "personal feelings toward the [supervisor] in the context of the employer-employee relationship," and was therefore not a matter of public concern. *Id.* at 296.

Captain LeVrier happened to overhear it, Ms. McPherson was not aware that he was still present in the room (App. 7a). It was Constable Rankin who, after hearing Captain LeVrier's report, summoned Ms. McPherson and demanded that she repeat to him—entirely out of context—the remark overheard by Captain LeVrier that had concluded her private conversation with Mr. Jackson, the rest of which only Mr. Jackson had heard. The incident came to the attention of other coworkers only after and because she was fired, and became known to the public only because Constable Rankin agreed to be interviewed on television about the matter. *See* page 9 *supra.* Neither this Court nor any court of appeals has upheld the discharge of a public employee who made a remark in the course of a private conversation about a matter of public concern, when the conversation neither caused nor threatened any disruption of office operations.[42]

This is not a case about maintaining office efficiency at all. It is a case about the discharge of an employee who voiced a deplorable thought in a private conversation that had no effect on office efficiency. That thought caused Constable Rankin to "los[e] confidence" in Ms. McPherson because he concluded, without bothering to learn the context of her remarks, that "she was the kind of person who would be a bad employee, would be a negative influence in the office" (J.A. 120). Such an unsupported and altogether subjective character judgment, based solely on a deplorably phrased expression of political opinion that was totally unrelated to Ms. McPherson's job function, is the sole justification advanced for her discharge. As this Court made clear in invalidating the dismissal of a student from a state university

---

[42] *See, e.g., Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985), *cert. denied,* 106 S. Ct. 2278 (1986); *Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 1789 (1986); *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982); *Van Ooteghem v. Gray,* 654 F.2d 304 (5th Cir. 1981) (en banc) (per curiam), *cert. denied,* 455 U.S. 909 (1982).

for distributing a newspaper containing a tasteless political cartoon, such "disenchantment" is "no justification for denial of constitutional rights." *Papish v. Board of Curators*, 410 U.S. 667, 667-68 n.3 (1973) (per curiam).

This Court has also repeatedly held that governments cannot deprive their citizens of public employment, or other liberty or property interests, because they express or possess unattractive political views. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), it invalidated a state statute that required public employees to take an oath denying past affiliation with the Communist party. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), it struck down a state statute barring state employment of members of organizations if certain public officials found those organizations "subversive." *See also Baggett v. Bullitt*, 377 U.S. 360 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960). As Justice Jackson warned long ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[43]

While disfavored views on matters of public concern may be a valid basis for the selection or discharge of public employees in some policymaking positions, "a nonpolicymaking, nonconfidential government employee can-

---

[43] The Court has upheld a loyalty oath that requires allegiance to the Constitution. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 679-80 (1972). Ms. McPherson freely took such an oath in this case (*see* J.A. 27). In *Bond v. Floyd*, 385 U.S. 116 (1966), the Court held that subscription to an organization's public statement sympathizing with and supporting draft evaders was not "a call to unlawful refusal to be drafted," *id.* at 133, and could not constitutionally be viewed as inconsistent with an oath of allegiance to the Constitution.

[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod v. Burns*, 427 U.S. 347, 375 (1976) (Stewart, J., concurring in the judgment); *see Branti v. Finkel*, 445 U.S. 507 (1980). *Elrod* involved the improper discharge of employees of a sheriff's office who had duties substantially more important than Ms. McPherson's. One of the employees served as the Chief Deputy of the Process Division and supervised an entire floor of the Sheriff's office. *Elrod*, 427 U.S. at 350-51. Another employee was a bailiff and security guard. *Id.* at 351. In *Branti*, the employees who were held to have been unconstitutionally terminated were public defenders. Since these positions were held to be nonpolicymaking, nonconfidential positions, *a fortiori* the same must be true of a data input clerk who, as the Fifth Circuit found, did nothing more than type what was given to her about the service of civil process (J.A. 136).

At bottom, the United States premises its argument for reversal here on the "decorum and professionalism" ostensibly required of all "lowly" employees in all government offices (U.S. Br. 28). Petitioners themselves make no such claim, arguing instead that those "enforcing the law" are "judged by different standards than are applied to the average citizen" (Pet. Br. 10).[44] In any event, Congress itself has disclaimed any legitimate governmental interest in restricting the private political speech of public employees under such a standard, specifically recognizing that "[a]n employee . . . retains

---

[44] Petitioners have never asserted, for example, that Ms. McPherson was terminated pursuant to any provision of Texas law justifying termination "for cause." *Cf. Arnett v. Kennedy*, 416 U.S. 134 (1974) (upholding dismissal for cause under Lloyd-La Follette Act for public statements erroneously claiming that a federal agency superior had accepted a bribe).

the right . . . to express his opinion on political subjects and candidates." [45]

Moreover, this Court has demanded that governmental standards for employee behavior be at least rationally related to the level of the employee's position and degree of contact with the public, and that they be precisely drawn to avoid penalizing the exercise of First Amendment rights. *Shelton v. Tucker*, 364 U.S. 479 (1960). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [46] In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), for example, although holding that a "State can require high standards of qualification" for bar membership, the Court required that any such standards "must have a rational connection with the applicant's fitness or capacity to practice law." Constable Rankin's "loss of confidence" in an employee with whom he never personally dealt, on the basis of a private remark whose context he did not bother to learn, falls far short of the required nexus to any need for "professionalism" among employees in the office.

Both petitioners and the United States also contend that a "law enforcement agency" has a legitimate interest in "maintaining the reputation and appearance of being fully committed to enforcement of the law," and in "employing only those persons who project a suitable image," and may discharge anyone who does not project that image (U.S. Br. 11, 22-23). Apart from its mischaracterization of the functions of Constable Rankin's

---

[45] *See* 5 U.S.C. § 7324(b). This Court has explicitly recognized this constitutional distinction between private expressions of political views by government employees and their active participation in political campaigns. *See Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

[46] *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

office,[47] this argument is misplaced here. As the United States concedes (U.S. Br. 16, 18), Ms. McPherson's comment was not directed to the public at all. Nor did she invite public scrutiny of her remark. Surely "project-[ing] a suitable image" is not a constitutionally sufficient reason for a local government to punish a private expression of political views—even one that is deplorably phrased—concerning the policies of the national Administration.

Petitioners (and the United States) seek to justify discharging Ms. McPherson on the ground that her remark demonstrated sympathy with or support for breaking the law. Like Representative Bond's statement in *Bond v. Floyd*, 385 U.S. 116 (1966), however, Ms. McPherson's remark did not support breaking the law. At most, it expressed an extreme lack of support for the policies and actions of the public official who might be the target of an unlawful act. Even assuming that Ms. McPherson actually "meant what she said," her statement connoted at worst such strong dislike for the President's policies that, *if* another attempt on his life were made, she hoped that it would succeed.

Such expressions are not uncommon when the victim of an illegal attack is a public leader who has followed policies or taken actions that offend a particular element

---

[47] As the court of appeals found (J.A. 130-31), law enforcement in Harris County is not the province of Constable Rankin's office. Even if it were, Ms. McPherson seeks reinstatement as a clerk/typist, not as a police officer.

We note, however, that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). While police agencies have a legitimate interest in fostering uniform appearance, *Kelley v. Johnson*, 425 U.S. 238, 248 (1976); *cf. Goldman v. Weinberger*, 106 S. Ct. 1310, 1313 (1986), that interest is obviously not at issue here. And "[o]ur problem involves direct, primary First Amendment rights," not hairstyles. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

of the public. On May 15, 1972, for example, Governor George Wallace of Alabama was permanently disabled by a would-be assassin. Governor Wallace's earlier actions and policies in opposition to the civil rights of black citizens were widely resented by many Americans of all races, including numerous public employees. Some, in their initial reactions to the news, may well have expressed satisfaction.[48] There was comparable resentment from a different quarter toward the actions and policies of Dr. Martin Luther King, Jr. because of his advocacy of civil rights for black citizens. When Dr. King was assassinated on April 6, 1968, an FBI agent in Atlanta who heard the news was reported to have exclaimed, " 'They finally got the s.o.b.!' " [49] Surveys of public reactions to the announcement of Dr. King's death reveal that this public employee's immediate reaction was not unique.[50] On the theories propounded by petitioners and the United States, impulsive outbreaks like these by public employees would have justified their dismissal.[51]

---

[48] *See, e.g., Wash. Post,* May 16, 1972, at A13, col. 3 (quoting a civil rights leader as saying that although the assassination attempt was a tragedy, "[o]ne might be tempted to say this in this case: the chicken came home to roost").

[49] S. OATES, LET THE TRUMPETS SOUND: THE LIFE OF MARTIN LUTHER KING, JR. 494 (1982).

[50] *See, e.g.,* W. CROTTY, ASSASSINATIONS AND THE POLITICAL ORDER 301-09 (1971) (survey of southern students' initial reactions to Dr. King's assassination; 59% of respondents described themselves as indifferent or elated); J. F. KIRKHAM, S. G. LEVY, & W. J. CROTTY, ASSASSINATIONS AND POLITICAL VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 89 (1969) (41% of southern white children agreed that "King himself was to blame").

[51] There was also widespread public endorsement of the lawbreaking involved in Jack Ruby's killing of Lee Harvey Oswald. The National Commission on the Causes and Prevention of Violence found that "[o]nly one out of three (thirty-three percent) felt that Oswald should have had a trial, and one in five (twenty percent) was actually pleased when Oswald was shot." J. F. KIRKHAM,

Wishing harm to the President of the United States is a deplorable way of expressing the strength of one's disagreement with the President's perceived policies or actions. Nevertheless, it has never been a punishable offense in the United States, as it was in England, to "compass or imagine the death of the King." [52] Indeed, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). As Justice Black stated:

> Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended.

Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring).

In Professor Chafee's view, the Framers intended the First Amendment "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible." [53] The narrow definition of treason in

---

S. G. LEVY, & W. J. CROTTY, *supra*, at 90. Some who condoned this act of lawbreaking must have been public employees.

[52] Statute of Treason, 1350, 25 Edward 3, Stat. 5, ch. 2. Even under English law, however, "loose Words spoken without any Relation to any Act or Design, were not Treason, or an overt Act of it." *Charnock's Case*, 91 Eng. Rep. 533 (K.B. 1695-96). *See also Pine's Case*, 79 Eng. Rep. 703 (K.B. 1628); 4 W. BLACKSTONE, COMMENTARIES *78-81.

[53] Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941). The Alien and Sedition Act, 1 Stat. 596 (1798), made it a crime to "print, utter or publish . . . any false, scandalous and malicious writing or writings against . . . the President of the United

Article III had the same purpose of preventing the punishment of citizens for expressing their political thoughts. *See American Communications Ass'n v. Douds*, 339 U.S. 382, 437-38 (1950) (Jackson, J., concurring and dissenting). The treason clauses of the Constitution, while derived from the English Statute of Treason, were carefully modified by the Framers. The Framers adopted the English statute's prohibitions regarding levying war against the state, adhering to its enemies, and giving aid and comfort to them. U.S. CONST. art. III, § 3. But they omitted any analogy to the English prohibition against compassing or imagining the death of the King.[54] And they refused to permit Congress to change this narrower definition of the offense.[55] Under the English statute, charges of compassing the death of the King had been used frequently to suppress political opposition. The Framers guarded against a legislative or judicial extension of the crime of treason in this country that would penalize ordinary, nonviolent political protests. *See generally Watts v. United States*, 394 U.S. 705, 709-12 (1969) (Douglas, J., concurring).[56]

States, with intent to defame [him] . . . ." In the Virginia Resolutions of 1798, Jefferson and Madison harshly condemned that Act as unconstitutional. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964). Although not held unconstitutional at the time, the Act clearly violated the First Amendment. *Id.* at 273-77.

[54] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 345-50 (rev. ed. 1966).

[55] *See* U.S. CONST. art. III, § 3 (limiting treasonable conduct "only" to the prescribed offenses).

[56] As James Madison explained, "new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other . . . ." THE FEDERALIST No. 43, at 273 (J. Madison) (C. Rossiter ed. 1961). Similarly, James Wilson stated that "[i]f we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. . . ." 3 M. FARRAND, *supra*, at 163.

If a "loss of confidence" can constitutionally justify the dismissal of a public employee for her private expression of political beliefs, it is difficult to see where the line between permissible and impermissible thought can be drawn. Should it be drawn to forbid wishing harm by unlawful means only to the President, or to any public official no matter how high or how low? Or should it be drawn at wishing harm by unlawful means to anyone, whether in public office or not? Or at wishing harm only to public officials of the same state or nation, or to any public official anywhere in the world (Adolf Hitler, Moammar Qadafi)? Or at expressing such a belief only in the workplace, or anywhere? Or at expressing such a belief aloud or in writing, or merely possessing such a belief without expressing it to others?

As the Fifth Circuit correctly held, Ms. McPherson's interest in privately expressing her thoughts to a close personal friend regarding the policies of the federal government clearly outweighed Constable Rankin's interest in being "comfortable" with her. To reverse that balancing would mean that public employers, despite the First and Fourteenth Amendments, could now impose sanctions against even the lowliest of their employees for the private expression of distasteful political views. This Court has never endorsed such a principle, and should not accept the invitation to do so here. "The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it." [57]

---

[57] *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180, 3215 n.21 (1985) (Stevens, J., dissenting) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring and dissenting)).

CO

For the foregoing reas
States Court of Appeals
affirmed.

BRUCE V. GRIFFITHS *
GREATER HOUSTON
AMERICAN CIVIL
LIBERTIES UNION
1236 West Gray
Houston, Texas 77019
(713) 524-6021

ALVIN J. BRONSTEIN
DAVID B. GOLDSTEIN
AMERICAN CIVIL
LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

* Counsel of Record

January 30, 1987

CLUSION

ıs, the judgment of the United
or the Fifth Circuit should be

Respectfully submitted,

LLOYD N. CUTLER
WILLIAM R. RICHARDSON, JR.
CARL R. JOHNSTON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ANNIE S. GARCY
GORDON QUAN &
ASSOCIATES, P.C.
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

Counsel for Respondent

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-1442

Houston, Texas, January 21, 1985

ARDITH MCPHERSON,

Plaintiff,

vs.

WALTER RANKIN, Individually in his official capacity as Constable, Precinct One (1), of Harris County, Texas; and Harris County, Texas,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

APPEARANCES:

For The Plaintiff:

Ms. Annie S. Garcy
Mr. Bruce Griffiths

For The Defendants:

Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:

June Simon

* * * *

[64] MS. GARCY: Your Honor, at this point we call the plaintiff, Ardith McPherson.

MS. McPHERSON: Do somebody have to swear me in?

MR. GRIFFITHS: Your Honor, I don't think she took the oath.

THE COURT: Would you swear her in, please.

(Witness sworn.)

ARDITH SHARESE McPHERSON, PLAINTIFF, SWORN

DIRECT EXAMINATION

BY MS. GARCY:

Q Please state your full name for the record.

[65] A Ardith Sharese McPherson.

Q And where were you born?

A Excuse me?

Q Where were you born?

A Oh. In South Bronx, New York.

Q And for how long did you live in New York?

A Eighteen years. Well, nineteen.

Q What specific part of New York were you raised in?

A Well, I was born in Queens, and then when I was ten years old, we moved to the Bronx. And then I was eighteen when I moved with my aunt. She told me—my mother told me to stay here for six months to finish out school, and then come back home after the school was through, and that's what I did.

Q So you moved to Texas to join your mother?

A Right.

Q Now, what part of the Bronx were you living in until you were eighteen? Can you be a little more specific?

A Oh. South Bronx.

Q And what people—what race or nationality of people live in South Bronx?

A Blacks and Puerto Ricans.

Q Okay. And Ms. McPherson, you are a black woman; is that correct?

A Correct.

Q How old are you at this time?

[66] A What? How old when I moved to the Bronx?

Q No. How old are you now?

A Now? Twenty-three.

Q Have you been to college?

A Yes.

Q For how many years did you attend college?

A Just one year.

Q And where did you go?

A Burrough of Manhattan Community College.

Q What was the concentration of your education? What were you studying?

A Secretarial Science.

Q Now, when did you begin to work for Constable Rankin's office?

A January 12 of '81. He told me I was employed to start January 14 of '81.

Q What position were you hired to hold when you first worked for Constable Rankin?

A Clerk Typist. Well, they didn't tell me the position. He just showed me the room and what I would be working on.

Q Okay. In order to get the job, did you have to take any kind of typing test?

A Just a typing test.

Q All right. Well, did anybody ask you any questions?

A Such as what?

[67] Q Did anyone interview you?

A Yes. Mr. Rankin.

Q Okay. How did you hear about the job in the first place?

A I didn't. At that time, since I—it was January, and I came down in July, and I had been looking for a job, and I just was walking into places, and that office happened to be one.

Q Did you know anyone else who worked at the office?

A Yes, I did.

Q Who did you know?

A Lawrence Jackson.

Q How do you know Lawrence Jackson?

A I met him at a park. He is my boyfriend now, and then, too.

Q Okay. Now, please tell Judge Black, what are the duties or responsibilities of a clerk typist?

A We would enter civil papers into a terminal.

Q And is there any dealing with the public? Did you ever talk to members of the public, on your job?

A No, I didn't. I didn't have a phone on my desk.

Q Okay. In the room in which you worked, was it a room that was generally accessible to the public?

A No. We had a sign on the door. I can't remember word for word what it said, but it means that the public wasn't [68] allowed in there.

Q During the time that you worked in that room, do you recall whether any attorneys came in to ask you any questions about papers that were going into the computer?

A No. The only time you would have to give an attorney a paper—they couldn't come back there. You had to go out in the front. And that wasn't part of the clerk typist's job. Those people—Lawrence was doing something different, he was the one authorized to do that.

And then it was this girl that worked in there, named Deborah Patway. She did the same thing, but she was only in there because she didn't have a terminal on her desk. She was in there to use it.

Q What kind of training were you given to learn how to use the CRT?

A A lady came in and she trained me for two days.

Q Okay. And was that training—did it concentrate only on using the computer?

A Yes. And it was both on how to use the computer and how to enter the paper into the computer the correct way.

Q Did you receive any other training?

A No. I haven't.

Q Were you given any training in weapons handling?

A No.

Q Were you ever told that you would be a guard for visiting [69] dignitaries?

A No.

Q Were you required to wear a uniform to work?

A No.

Q Did you wear a gun?

A No.

Q Could you wear a gun?

A No.

Q During the time that you worked for Constable Rankin, did you have a lot of contact with the Constable?

A No.

Q Did you ever speak to him?

A Yes, I did. On some mornings he would come over and he would say, you know, hello, to everybody in the room. Individually go to their desks. And we would say hello back, and he would leave.

He—some mornings we never did even see him. We saw him in the afternoon when he came in. He didn't say hello or anything. He didn't speak to me, you know, hold a conversation. Just Hi.

Q Had you ever spoken with Constable Rankin in his office before the time that he called you in to ask you about your comment?

A No.

Q Now, on March 30, 1981, I'm sure you recall that there [70] was an assassination attempt against the life of the President.

A Yes.

Q Okay. And you were at work that day; is that correct?

A Yes.

Q Now, how did you first hear about the assassination attempt?

A The radio. It was on the radio.

Q Where was the radio?

A The radio was on Heidi Cornelison's desk.

Q And so was the radio in the room in which you were working?

A Right.

Q Now, Ms. McPherson, were you working at the time that you heard that announcement?

A Right. I was entering papers at the same time.

Q Okay. Now, were there other people in the room?

A Yes.

Q Who were they?

A Heidi Conelison [sic], Tina Richardson and Lawrence Jackson and myself.

Q Were the other three people also working?

A Heidi and Tina, they were on their lunch break, but they was taking it inside the office. Just Lawrence was back from lunch, and he was entering papers, and I was entering lots of them.

[71] Q Now, would that hour have normally been your lunch break?

A No. We had different ones. That was their lunch break.

Q Was it common that you might be talking during the time that you were working at the CRT?

A Yes.

Q How frequently was that radio played during the time that you were working?

A Every day, all day, as long as we keep it low.

Q Now, do you remember whether there were any members of the general public in the room at the time that the radio announcement came on?

A No. There weren't.

Q Now, what did the other women in the room do, or how did they respond to the radio announcement? Did you notice?

A They didn't respond, because if they responded, they obviously would have told me something or said something. And, actually, they were talking to Captain LeVrier. That's probably why they didn't hear me.

Q Captain Levrier was also in the room?

A Yes.

Q Now, was he already in the room when the radio announcement came on, or do you think he came in later?

A He came in later. He came in—he takes papers. At the time, he was taking the papers to Precinct 6 and 7.

[72] And he came in the room, and he asked, does anyone have any papers to go to six and seven. Everybody said no. And I believe Lawrence said yes, he did, and he was giving him one.

So at that time, I continued entering papers, and my head was down, so I thought he went out the room. But evidently he didn't go out the room, he was like talking to Heidi and Tina, and they were like—it's like the corner to where I was, where I sat.

And me and Lawrence just continued, you know, on talking. And he was talking to Tina and Heidi. That's why he didn't hear me. And so he—all he heard me say was if they go for him again, I hope they get him. And he thought—took it as a remark, which in a sense it was the tail end of the conversation.

Q Okay. Well, let's go back through your conversation again. To whom—well, let me ask you this way. After you heard the announcement on the radio concern-

ing the President—the assassination attempt against the President, did you talk to anyone?

A Yes.

Q To whom did you talk?

A I talked to Lawrence Jackson.

Q Okay. Did you talk first, or did Lawrence Jackson talk first?

[73] A I talked first.

Q What did you say?

A I said I felt that that would happen sooner or later.

Q Okay. And what did Lawrence say?

A Lawrence said, yeah, agreeing with me.

Q Okay. Now, when you—after Lawrence spoke, then what was your next comment?

A Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

He didn't even get shot then. You know, he was in the—got pushed in the car, they said. But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him. That's the part that LeVrier heard.

Q Were both you and Lawrence discussing cutbacks? Social cutbacks? Or was only—was it only your conversation?

A Just me and Lawrence was talking.

Q Okay. But did Lawrence also say something about cutbacks?

A We weren't—well, you see, we weren't discussing cutbacks. We just—that was the conversation. We just mentioned that.

[74] Q Okay. Well, let me see if I can ask it better. You said that you were talking about the Reagan Administration cutbacks and CETA.

A Lawrence said—okay. Lawrence said, they are cutting back CETA and welfare. Okay. And I said, yeah. And welfare and medicaid. You see, we wasn't discussing it. Because it just all happened in a short span of time.

Q Okay. But both of you were talking about--

A Right.

Q —the cutbacks; is that correct?

A Right.

Q Okay. Now, up until that point, did anyone else participate in the conversation with you and Lawrence?

A No. They were having their own. Just at that point when I said that, then Captain LeVrier showed up.

Q Now, do you think—was that conversation that you had with Lawrence something that—as far as you were concerned, were you talking to Lawrence and to the other people in the room, as well?

A No.

Q Were you talking only to Lawrence?

A Only to Lawrence.

Q Would you consider that to be a public conversation or a personal conversation?

A It was a personal conversation.

[75] Q Okay. Now, Ardith, would you please repeat your comment, to the judge.

A If they go for him again, I hope they get him.

Q Now, does that comment—well, what did you intend by that comment?

A It was just the end of the conversation. It was just a verbal expression. It doesn't mean that I want the man dead.

Q Did you intend at that moment to inflict any kind of harm against the president?

A No. I did not.

Q Did you support the commission of harm—were you hoping that someone would go kill the president?

A No. I was not.

Q Did anyone—after you made that statement, did anyone in the room respond to your statement?

A No. Oh. Well, Captain LeVrier. After I said that, he came to my desk, and he said, you don't mean that, do you. And I just looked up at him in surprise to see him in the room, because I thought he had left after he asked us did we have any papers. And then I just looked up at him and smiled, and he stood there waiting for an answer. And then he left the room.

Q Did you return to working?

A Right.

[76] Q Did your conversation with Lawrence go on to any other topics, or was it over?

A Yeah. We was talking about something else.

Q Now, after you made your comment, did Lawrence Jackson say anything to you like, s-h-h-h, be quiet, don't say that?

A No.

Q Now, what was the next thing that happened to you as a result of your statement?

A Well, in between about five or ten minutes later, Jack came in the room, and he motioned for me to come. He called my name. Then he motioned for me to come here, and then he told me, he said, either Mr. Rankin or either the boss want to see you in his office.

Q And is Jack the chief deputy?

A Right.

Q And what did you say? Did you say anything to Jack in response?

A No. I didn't. I just followed his orders.

Q Now, did you go to the constable's office?

A Yes. I did.

Q Okay. And did the constable give you an opportunity to explain your statement?

A No. He didn't.

Q Would you please tell the judge what did the constable ask you.

[77] A Okay. He pointed where to sit. I knew that meant sit right there, so I sat.

Q He pointed with a what? I'm sorry.

A He pointed with his finger where to sit. So I knew that meant sit down right there, so I sat. And he said, I heard a disturbing remark.

I didn't know what he was talking about, because I didn't know it got to Mr. Rankin. So he said, did you say if they go for him again, you hope they get him. And I said, What? You know, it wasn't what, I didn't hear him, it was what—you know, I was surprised that he knew about it.

And I said, yeah, but I didn't mean—and he went on ahead and said something. And then he asked Captain LeVrier, he said, what do you think she meant by this. He said, I don't think she meant anything by it. She just didn't know how it sound when she said it.

He said, I just won't tolerate that in here. It's a public service office, and we for Reagan, and some other stuff he was saying. And he said, I just won't tolerate that in here.

And at the same time he was saying that, he put his hand on the knob. He was going out there. Ms. May, take her off the payroll. And I knew that meant right there that I was fired.

Q Was Constable Rankin walking out of the room?

[78] A At the same time when he said, I won't tolerate that in here, he was—see, he stood up, and, you know, walking to the door.

Q Did you make any effort to explain your statement?

A I just said, wait a minute, Mr. Rankin. Ms. May, take her off the payroll. And so I just said, oh, boy.

Q So did you go—well, what did you do? Did you leave the constable's office?

A Afterwards, no. Afterwards I said, oh, boy. I just went back in the back and just gathered my things up. And I told Lawrence, you know, what had happened, and it was—oh, it was this—I think she is Vietnamese. I was telling her about what happened, and then Heidi

overheard me. And she said, wow, I didn't even hear you say that, you know.

And I was about to tell Lawrence something, but he was gone. I didn't know where he was at. Then when he came back, he told me he was in Rankin's office.

Q All right. Did you leave Constable Rankin's office?

A Yes. After that, I went home.

Q Did you go—ever go back to Constable Rankin's office?

A Yes. The next day.

Q Why did you go back?

A Because I wanted to talk to him.

Q Why did you want to speak with him?

A I wanted to explain myself. He wouldn't listen to me.

[79] Q Who did you talk to when you went back?

A I talked to his secretary, Ms. May. I asked her if Mr. Rankin was in, because I would like to talk to him. And she said well, he's very busy right now.

Then she said, if you have a seat in the waiting area. I waited out there for an hour, and he was still busy, so I told her I was going to lunch, I'll be back at 12. And I came back at 12, and then she said, oh, Mr. Rankin is still busy. She said, why don't you come back in about two hours.

And I said, okay. So I went somewhere, I guess, you know, and came back. It was two o'clock. And then I said, Ms. May, Mr. Rankin still busy. And she said, hold on a minute. And then she got up and she went in the back to where Mr. Rankin was. And then she came back and she told me, she said Mr. Rankin is still busy. He's going to be busy the whole afternoon.

I said okay, Ms. May. I'm sorry. I won't bother you no more. I said, I'm not going back no more, because I see he don't want to see me.

Q Okay. Were you ever contacted by members of the newspaper media?

A Yes, I was.

Q Did you call them, or did they call you?
A They called me.
[80] Q How soon did they call you?
A Well, this happened on Monday. They called me that Thursday afternoon.
Q Were you contacted by members of the television media?
A Yes, I was. The next day.
Q Did you call them, or did they call you?
A They called me.
Q Did you go on television?
A No. My mother wouldn't let me.
Q Okay. Do you remember whether Constable Rankin went on television?
A Yes. That day I got fired, on the 30th, he was on T.V. that night.
Q Okay. Were you contacted by the Secret Service?
A Yes, I was. The same day, that Thursday, that the newspaper had called me.
Q Now, you were fired on what day of the week?
A It was a Monday.
Q Okay. So when the Secret Service came to your house, did they call you and make an appointment first, or just—
A No, they didn't.
Q How many people came from the Secret Service?
A It was two men.
Q Okay. What did they tell you about the report that they had received concerning your remark?
[81] A Excuse me?
Q What did they tell you about why they were there to see you?
A Oh, they told me that they thought it was a prank call, but they said they got a call, they said they think it was a prank call, but they have to investigate any call that they get.
Q And did they ask you questions?

A Yeah. Well, one of them, he proceeded to talk to my mother. And the other one told me he had some papers for me to fill out, and he said, can we sit at the table. I said sure.

Q Okay. And did you fill out some papers?

A Well, one paper was—he told me, he said it was the Constitution of the United States, and it was typewritten. And he told me he want me to write that down in handwriting, he said because they have some threatening letters up in Washington, to the President, and he want to compare mine with that, to see if I sent any threatening letters.

I said, sure, I'll do it, because I don't have nothing to hide. Then he gave me this other paper, and he said, this is to give us permission to go to all mental institutions—I don't know if he said in Texas or in Houston—he said to go to the mental institutions to see if I was ever committed in any one of them.

[82] I said, sure, I ain't got nothing to hide. I ain't never been in any of them.

Q Okay. Now, did the Secret Service ever come back to see you again?

A No. They didn't. They just—when they left, they just told my mama and me that they were sorry. They said that they knew it was a prank call, they just have to come out and investigate. They said that's the procedure.

Q Now, how did you feel about the Secret Service contacting you?

A How did I feel? I was angry. I was paranoid, for one thing.

Q Okay.

A Upset.

Q Well, do you think that your comment was something important enough to justify the Secret Service coming to see you?

A No, I don't. I think it was just a little something that was said in the office. It was true enough it was in

the office, but it was to someone else, and I think it should have stayed there in the office.

Q Ardith, nothwithstanding your statement concerning President Reagan, do you think—I mean, is it your testimony that you would follow all the rules and the regulations of Constable Rankin's office if you worked for [83] him?

A Yes. I would follow his rules.

Q Okay. Ardith, I need to show you what has been marked as exhibit number 9, I think. Yes. Now, the first page of that exhibit, could you please tell the judge what Burnett is.

A Burnett is a temporary agency that, you know, you call them every morning and then they will call you back and let you know if they have a job for you to go out on.

Q And have you had occasion to work through that agency since the time that you left employment with Constable Rankin?

A Yes. I have.

Q Okay. And how much, in all, have you earned with that agency?

A Well, let me see. In '83, it says I had earned $471.63. In '84, it says I have earned $2,844.26.

Q Now, on the second page of exhibit number 8, there is a W-2 form. Is that from an employer with whom you have worked after the time that you left Constable Rankin's office?

A Yes, it is.

Q Okay. And what employer is that?

A It's Kelly Services. It's another temporary agency.

Q How were you employed with Kelly? As a temporary clerical worker?

A Oh, yeah. They were sending me out on clerical [84] assignments. Secretarial assignments. It depends on what the company is asking for.

Q How much does the W-2 form reflect that you earned with Kelly?

A It says I earned $5,350.

Q Thank you. Have you also been employed with Sofwear Shoes, since the time that you left employment with Constable Rankin?

A Yeah. That was the same year I left his office.

Q And could you please give the judge an approximation of your total earnings with Sofwear Shoes.

A It was approximately $10,000 a year.

Q Now, Ms. McPherson, how much money were you earning per hour during the time that you were working for Constable Rankin?

A I was earning the minimum wage, $3.35 an hour. And in between that time and the time I had left, which is January of '83, I have been making—I went up to 3.50, 3.75, 4.15 and then 4.50.

Q How many hours a week did you work when you were working for Constable Rankin?

A Forty hours.

Q Okay. Now, did you work a 40-hour week for Sofwear Shoes?

A Yes, I did.

[85] Q Do you recall when you began working for Sofwear Shoes?

A 7-29 of '81.

Q Okay. For how long a period of time did you work —well, do you remember when you left Sofwear Shoes?

A All I know was 1-83,and it was the first week in January.

Q And then did you go to work then for the Kelly Girls?

A Well, I had signed up with them. Oh, after Sofwear had laid me off, I went to unemployment. At the end of the month, I said I didn't find anything.

Q How much did you receive in unemployment benefits each week?

A $94 a week.

Q And until what date were you on unemployment?

A To what date? It was some day in July that it ran out in, and they told me something about extended benefits, and that lasted through September. So the end of September was the last check I had got.

Q That would be September, 1983?

A Yeah. '83.

Q Okay. And then did you begin working with Kelly in September, '83.

A No. Not yet. Kelly, I only worked with them a half a day assignment in '83.

Q Okay. Well, then—

[86] A And it was '84 that you could really say I worked for Kelly.

Q Okay. So you only had half-day assignments up until 1984?

A No. I worked with Burnett. I was working with Burnett.

Q Okay. And then after you worked for Burnett, then did you work for Kelly Girls?

A Yeah. Yes, I did. But that was—

Q Or was it at the same time?

A Huh-uh. Only time I worked for Kelly in '83 was a half a day assignment.

Q Okay. I just need to repeat to clarify in the record. You worked for Sofwear Shoes from July, 1981 through January, 1983; is that correct?

A Yes.

Q So you worked there all through 1982?

A Right.

Q Okay. And are you cu rently working with Burnett?

A Yes.

Q Okay.

A And Kelly.

Q Now, do they guarantee you 40-hour weeks?

A No.

Q And what is your hourly wage when you do work?

A It differs on the type of job we are doing.

[87] MS. GARCY: I'll pass the witness, Your Honor.
THE COURT: Mr. Lee.
MR. LEE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LEE:

Q Ms. McPherson, I understood you to say that you had a year of college before coming to Texas.
A That's correct, sir.
Q Was it a prerequisite of getting into college that you have a high school graduation diploma?
A Yes, I do.
Q Where was that high school graduation?
A Avery Fisher Hall in New York.
Q All right. Is that from a school in the State of New York, that you graduated?
A The diploma is from a school in New York where I graduated. The graduation was at a big production hall.
Q All right. You did graduate, though, from a school in New York?
A Yes, I did.
Q A state school?
A Yes. I have.
Q As a part of the curriculum in that school, did they teach the English language?
A Yes, they did.
[88] Q Did you take all of your classes in English?
A Yes, I have. I majored in English.
Q And you did pass the course?
A Yes, I have.
Q You read and write English?
A Yes.
Q You speak and understand English?
A Yes.
MR. LEE: May I approach the witness and examine plaintiff's exhibit 1, Your Honor?
THE COURT: Yes, sir.

BY MR. LEE:

Q Ms. McPherson, on plaintiff's exhibit 1 is attached to it an application and contract of employment. And do you recognize your name as being on this instrument?

A Yes, I do.

Q And, in particular, at the bottom half of the instrument, dated January 12th, 1981, an instrument that is capitalized as deputation.

A Do I see it?

Q Do you see it?

A Oh, yes.

Q All right. And do you notice that it says, I, Walter H. Rankin, Constable, precinct number 1, having full confidence in Ardith S. McPherson, do nominate and appoint [89] him, the said Ardith S. McPherson, true and lawful deputy in my name, stead, place and stead, to do and perform any and all things pertaining to the office of said constable?

A Yes, I see that.

Q All right. And down below there then is an oath of office. And do you recognize your signature to that oath of office?

A Yes.

Q And in that oath of office, do you not say that you will faithfully execute the duties of—and it's typed in, clerk—and will to the best of your ability preserve, protect and defend the Constitution and laws of the United States and of this state?

A Yeah.

Q All right. When you signed this instrument, did you have in your mind any reservation as to what you meant by taking the deputization oath and swearing to uphold the Constitution and laws of the United States?

A Well, if I signed this, it means I—maybe because it was written in words that I swore, but no one told me to raise my hand like I did just now and—I didn't swear that way.

And when I signed this paper, if it matters any, when I signed this paper, Rankin's signature was not there, and if I am correct—which I do not remember—I don't even think this stuff was typed in.

[90] Q All right. Do you have a reservation in your mind now to taking an oath to uphold the Constitution and Laws of the United States.

A No, I don't.

Q Do you have any reservation in your mind now to be a deputy of Constable Rankin and do in his place and stead anything that he could do?

A I don't understand. Say that again. I mean, if you are asking me, you know, like would I sign, it's yes.

Q You did sign it?

A I mean would I feel that—

Q But when you signed it, did you have your fingers crossed where you said pick a lock, I don't mean this, but I'm going to sign it to get paid?

A Oh, no.

Q You did mean then at the time that you entered this contract, that you would be a Deputy Constable and do Rankin's work for Rankin?

A Yes.

Q Like Rankin would want it done?

A Yes.

Q And you would uphold the Constitution and Laws of the United States and of the State of Texas?

A Right.

Q All right. Let us go then to your pleadings. In [91] paragraph numbered 16 of your complaint filed with this court, you have said here that during the course of said private discussion, plaintiff—that's you—

A Uh-huh.

Q —stated to the other employees, "I hope if they go for him"—and in parenthesis President Reagan is inserted—"I hope if they go for him again, they get him."

Now, is that a correct interpretation of what you said?

A That is correct, sir.

Q All right. Now, that's in English. Is there any reservation in your mind as to the truth of that statement?

A Okay. It's—

MR. GRIFFITHS: Objection, Your Honor. We are going to object to what statement he is referring to, whether it is the truth of the statement quoted or the truth of the statement in the complaint. It's not clear whether he is asking her is it true that your complaint says that, or is it true that you said it, or is it true—is the statement somehow true. I think it needs to be clarified before she can answer that.

THE COURT: Would you restate the question.

MR. LEE: All right.

BY MR LEE:

Q Is that statement in your complaint as you made the [92] statement in the computer room?

A Yes.

Q All right. And that was made in English?

A Yes.

Q It didn't have any foreign language meanings to any of it?

A No.

Q All right. Now, when we were in trial here before—and this was February 14, 1983—page 17 of the transcript of the hearing there, we have an answer, and the answer is—I believe we will find is you, and the person asking the question is your attorney, Ms. Garcy.

A Okay.

Q All right. And at page 16, line 21, this is the answer, so you are talking here and you are telling the court, "And then—oh, after I said the comment you are talking about, in comes Captain LeVrier. He props up on the side where I couldn't see, and I saw him. And he said, 'You didn't mean that', you know. And he was supposed to be talking to Heidi and Tina at that time,

so obviously, he wasn't listening to what they were saying. He was listening to me having my conversation with someone else."

At line 5 on page 17 you are continuing, "He said, 'You didn't mean that.' I looked at him in surprise because I thought he left the room. I didn't say nothing. I smiled [93] and he smiled back at me, and he walked out the room. I didn't think nothing of it."

All right. Now, you have told me that you understand English. Captain LeVrier asked you, you didn't mean that. And you say, you didn't say nothing.

A I didn't say anything. I just (indicating), just like that.

Q All right. Is Captain Levrier any way your supervisor?

A No.

Q Is he your superior officer?

A No.

Q All right. He is not entitled to an answer when he asks you a question, if you mean it?

A No.

MR. LEE: Very good.

I have nothing further of this witness, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MS. GARCY:

Q Is Lawrence Jackson a black man?

A Yes.

MS GARCY: Okay.

Your Honor, I have nothing further.

EXAMINATION

[94] BY THE COURT:

Q Ms. McPherson, you said you went back to the constable's office the day after this incident, to talk to

Constable Rankin and explain everything to him; is that right?

A Yes, Your Honor.

Q Well, he is sitting over there right now. Why don't you explain it to him now so I can hear you.

A Okay. Well, Mr. Rankin, what I wanted to tell you the next—that day, and the next day, was that I didn't mean anything by what I said. I didn't literally mean, you know, to go out and kill the President, anyone go out and kill the President. It was just a verbal expression, and it was the end of the subject.

Me and Lawrence was talking and having a conversation in the office, like we always do. And what Captain LeVrier heard—see, he was talking to Heidi and Tina, and what he heard was the end of the subject. And, see, then he went back and told Riley that, and when he went back and told you, they said it was a remark. It wasn't a remark. It was the end of the conversation. He didn't hear anything else.

Q And you just meant to say that you were unhappy with President Reagan?

A Right. I just disagreed with his policy.

THE COURT: All right.

Anything further?

[95] MS. GARCY: Nothing further.

MR. LEE: Nothing further, Your Honor.

THE COURT: Thank you, ma'am. You may go back to counsel table.

THE WITNESS: Thank you.

* * * *

[137] MS. GARCY: Your Honor, we would call Lawrence Jackson.

THE COURT: All right.

You were sworn this morning, weren't you?

MR. JACKSON: Yes, sir.

LAWRENCE JACKSON, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. GARCY:

Q State your name for the record.
A Lawrence Jackson.
Q Okay. How old are you?
A Twenty-six.
Q Are you a black man?
A Repeat your question.
Q Are you a black man? Are you of the black race?
[138] A Yes, I am.
Q Are you a resident of Houston, Texas?
A Yes.
Q And have you previously testified in this case?
A Yes, I have.
Q At the time that you testified in this case in February, 1983, were you employed by Constable Rankin?
A Yes.
Q And have you left that job since that time?
A Yes, I have.
Q For how long a time, in all, did you work for Constable Rankin?
A Two and a half years.
Q Did you have the same job position the entire two and a half years?
A Yes.
Q And what was that position?
A I was a deputy clerk.
Q What were your job duties as deputy clerk?
A Well, my main responsibilities were data entry retrieval, entering different documents into the CRT, and I picked up papers from the district and county clerk's office.
Q Is that the same job that Ardith McPherson had when she worked for the Constable?
A Yes.

[139] Q And did you two work in the same room?

A At the time, yes.

Q How closely were you seated to each other?

A Well, we were a few feet away from each other.

Q Was it common that you and Ardith would talk to each other during the work day?

A Yes, it was.

Q Was it common that the deputy clerk typists would talk among each other during the work day?

A Yes, it was, basically to break the monotony.

Q In order to talk to Ardith McPherson, did you need to yell or raise your voice in any way?

A No.

Q How many other clerk typists worked in that room in March of 1981?

A It was six, as a total, if you include the supervisor.

Q Okay. Is that room set off from the general public?

A Yes, it is.

Q How is it set off?

A Well, from the main entrance into the office, it was down the hall to your left. And generally the public never did come that way unless they were going to the warrant division, which was past our office.

Q Was there any kind of a sign on the door concerning who was authorized to enter the room?

[140] A Well, at the time, on the glass it was a large sign saying absolutely no one was supposed to enter this room.

Q Did any members of the general public ever enter that room?

A No. If it was, it was very, very, very rare.

Q Okay. And on those rare occasions, who were the people who would come into the room?

A Well, from time to time, if any, it would be an attorney, if he was picking up a civil paper if that was to be returned back to court, and he probably would

want to talk it through. I mean, he would probably want to walk it through, himself, instead of letting it go through the district clerk or county clerk's office, if it had to be in court maybe that day or the next day, and the court would have had to have that returned.

Q Okay. Now, in order to work as a clerk typist, you didn't need any certification as a law enforcement officer, did you?

A No, you didn't.

Q As best as you can recall, during the time that you worked there, were there other persons who were assigned to work as clerk typists, who were not promoted to other positions in the Constable's office?

A Well, there was other clerks, as you say, that they may have changed from one section to another, but they would [141] still be a deputy clerk within that office.

Q Okay. Would it require a promotion or a reassignment in order for you to go out and serve papers?

A No.

Q But would it require any other training for you to go out and serve papers?

A No.

A Would it require any certification of some sort?

A No.

Q Well, are you personally already certified, or in the past have you been certified to serve civil papers?

A Yes, I have. I have been through the Sheriff's Academy.

Q So is that why you are saying no, because you personally are qualified to do that?

A Yes.

Q Okay. But in order for you to have served papers in the past, did you need that training?

A Yes, you would. You would have to be a certified officer. If you was working on a full capacity, you would have to be certified and commissioned, whereas they had other officers who just worked in the evenings. They was reserve deputy constables. And they was also authorized

to serve papers. But they would have to have that training in order to go out and serve a paper.

Q Okay. So for the other clerk typists who were hired on, [142] and, for example, were not commissioned or trained in any way, would they require additional training in order to be assigned to serve papers?

A No. They still would have to go through—they would have to go through that academy.

Q Okay. How close a relationship did Constable Rankin maintain with the clerk typists in his office during the time that Ardith worked there?

A Well, I would say pretty loose, you know. Well, at least that's the way it was between me and Constable Rankin. We spoke, hello, and everything, but we never did get close.

Q Okay. Did you have conservations with the constable on a daily basis?

A No. Not really.

Q Did you ever have to go into his office to discuss with him the duties of your job?

A No.

Q Would he come into the office where you worked, for any reason other than to say hello to the other workers, for example?

A No.

Q How frequently would he come into the office where you were working?

A Well, at the time, maybe about twice a week.

Q How long did you know Ardith before she came to work [143] in Constable Rankin's office?

A Around five months.

Q Now, were you working at Constable Rankin's office in March, 1981, when there was an assassination attempt against President Reagan?

A Yes, I was.

Q And were you in the office working at the time that you first learned of that event?

A Yes.

Q Okay. How did you first learn about that event?

A I learned about it through the radio broadcast, that there was an attempt on the President's life.

Q And was the radio—where was the radio?

A Well, it was—basically, it was almost next to me, but it was just a few feet away. I can get up and turn it up or turn it down.

Q How frequently was the radio turned on during the work day?

A Well, it was turned on every day, and it would stay on basically throughout the whole time we was working.

Q When you first heard the news about the assassination attempt, how did other people in the room—aside from you and Ardith, how did other people in the room react?

A Well, they was quite shocked.

Q And who were the other people in the room?

[144] A Well, at the time when we first heard the broadcast, it was Heidi, Tina, and there was Tiki, or—excuse me, Ardith—and myself.

Q What was your reaction when you first heard the news about the assassination attempt?

A I also was shocked.

Q Did you discuss the attempt with anyone?

A Well, not right away. At first I listened to hear further details about his attempt. Then later on, Ardith and I, we broke off into a little conversation about the social programs that he was cutting back on.

Q Who began the conversation between you and Ardith?

A She did.

Q And what did she say to you?

A Well, after getting my attention, you know, she felt that it was going to happen, you know, sooner or later, and we started talking, and then right away we started talking about the programs like welfare, food stamps, CETA programs, and social security, because

those are the ones that was on the news the most frequently, so those was the topics that we was discussing at that time.

Q Did each of you make comments concerning the social program cutbacks?

A Excuse me?

Q Did both of you make comments concerning the welfare [145] cutbacks?

A Well, we just mentioned them. We didn't go into too much detail about it.

Q Okay. Could you please explain, did Ardith McPherson say anything more to you after you discussed the cutbacks in social programs?

A Well, during our conversation—well, she brought it up. Well, she said, I hope the next time, they get him. But that was it. I continued on working, and I assumed she had, too.

Q Okay. Now, at the time that you and Ardith were talking, were you talking to Ardith only, or were you talking to anybody else in the room?

A I was just talking to her. No one else.

Q In your opinion, was that a private conversation?

A I would say so. It was private, because I wasn't talking in general, and neither was she. Well, meaning general, I wasn't including everyone else in the office. I was just talking to her.

Q What do you think that Ardith meant by her comment about the President?

A Well, I don't think that she meant any harm, or anything of that nature. I basically felt that it was a response and an expression.

Q Okay. And what do you think it responded to?

[146] A Well, she responded to what she had heard on the radio. The broadcast.

Q Do you think that Ardith McPherson meant to do anything to the President?

A No, I don't.

Q While you were talking to Ardith, were you aware of whether anyone was listening to any of your conversation?

A. No. I was not aware.

Q How did you first become aware that someone heard part of your conversation?

A Well, after she said her last line in her conversation, Captain LeVrier appeared in front of her desk—well, her cubicle, because we had two dividers on both—everyone had two dividers on the side of their desk and terminal, so you couldn't see really who was to the left or to the right of you unless you leaned forward to look either way.

And he appeared at the front of her desk. And he said to her, well, you don't mean that, do you. And she appeared shocked. And I was just looking at them both. And she didn't say anything, and he left out.

Q Were you surprised that Captain LeVrier had heard part of that conversation?

A I was very much surprised, because he was already involved in another conversation with two other ladies, and on top of that, the radio was still playing. And of course, me and her—me and Ardith—was talking, so I was very much surprised that he had heard what he did hear.

Q Did the other two workers in the office say anything to you in response to the conversation that you and Ardith were having?

A No. They didn't say nothing.

Q Were any members of the general public coming into the room after the conversation? Immediately after?

A No. No one.

Q How did you first learn that Ardith McPherson had been fired?

A Well, first of all, I was still working at my terminal, adn Captain LeVrier was coming up to my terminal, or to my desk. And he said to me, let me tell you something. I only speak the truth, and—you know.

And I looked up at him, and I said, what are you talking about? And immediately behind him—well, Ardith was walking behind him. And she said, Lawrence, I just got fired. And I said, for what. She said, because of what I said. And I said, well, what did you say. And she said, what I said about the President.

I still was rather shocked because that was a conversation we had had earlier, and I had forgot that Captain LeVrier had heard at that time. And he went out and probably said something about it. So I was quite shocked. [148] Q Did Constable Rankin ever question you concerning the content of your conversation with Ardith McPherson?

A To my knowledge, no.

Q And did anyone else in the office ever ask you about what you and she had been talking about?

A No.

MS. GARCY: I'll pass the witness, Your Honor.

THE COURT: Okay. Mr. Lee.

MR. LEE: I have no question of Mr. Jackson, Your Honor.

THE COURT: Thank you, Mr. Jackson.

MS. GARCY: Your Honor, plaintiff rests.

* * * *